UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Duke Energy Carolinas, LLC Docket No. ER08-730-000

(Issued May 29, 2008)

Attached is the joint statement by Commissioners Wellinghoff and Kelly dissenting in part to the order issued on May 23, 2008, in the above referenced proceeding. *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201.

Kimberly D. Bose,
Secretary.

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WELLINGHOFF and KELLY, Commissioners, dissenting in part:

We write separately in order to discuss the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Maine Public Utilities Commission v. FERC*.[1]

In *Maine PUC*, the D.C. Circuit addressed the circumstances in which it is appropriate for the Commission to apply the "public interest" standard of review, which the court described as "much more restrictive" than the "just and reasonable" standard.[2] The D.C. Circuit made clear that the Commission may not apply the "public interest" standard when it considers challenges brought by a non-party to an agreement. The court stated:

> In the instant case, we are presented with a question of first impression: may the Commission approve a settlement agreement that applies the highly-deferential "public interest" standard to rate challenges brought by non-contracting third parties? We think not.[3]

Using similarly unambiguous language, the court further stated, "[W]hen a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply; the proper standard of review remains the 'just and reasonable' standard in section 206 of the Federal Power Act."[4]

In support of this conclusion, the D.C. Circuit noted that "[c]ourts have rarely mentioned the *Mobile-Sierra* doctrine without reiterating that it is premised

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[1] 520 F.3d 464 (D.C. Cir. 2008) (*Maine PUC*).

[2] *Id*. at 476.

[3] *Id*. at 477.

[4] *Id*. at 478.

on the existence of a voluntary contract between the parties."[5] The court also observed that "it goes without saying that a contract cannot bind a nonparty."[6] From these starting points, the court reasoned that "the *Mobile-Sierra* doctrine is designed to ensure contract stability as between the contracting parties – *i.e.*, to make it more difficult for either party to shirk its contractual obligations."[7] Similarly, the court stated that the *Mobile-Sierra* doctrine applies "to preserve the terms of the bargain as between the contracting parties."[8] By contrast, the court found that non-parties have a "statutory right to have rate challenges adjudicated under the 'just and reasonable' standard."[9] Elaborating on this finding, the court stated, "[T]he relevant statutory language is quite clear: section 206 of the FPA states that 'upon complaint' the Commission must determine whether the challenged rate is 'unjust, unreasonable, unduly discriminatory or preferential.'"[10]

The *Maine PUC* decision is relevant here because the Amended Piedmont Agreement addressed in this order includes the following provision:

> 12.2. *Mobile-Sierra* Public Interest Standard. Except as provided in Section 12.3, to the extent this Agreement is challenged by any person or its terms are subjected to review under the Federal Power Act or other Laws, the "just and reasonable" standard shall not apply. Instead, absent the agreement of both Parties to the proposed change, and except as provided in Section 12.3, the standard of review for changes to this Agreement proposed by a Party, a non-party, or FERC acting *sua sponte* shall be the "public interest" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

In this order, the majority concludes that it need not consider whether this provision is just and reasonable and not unduly discriminatory or preferential because the provision is unchanged from the parties' previously accepted Original Piedmont Agreement. The majority acknowledges the recent issuance of the

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[5] *Id.* at 477.

[6] *Id.* at 478 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002)).

[7] *Id.* at 479 (emphasis in original, citation omitted).

[8] *Id.* at 478 (citation omitted).

[9] *Id.*

[10] *Id.* at 478-79.

Maine PUC decision, and it states that if a non-party to the Amended Piedmont Agreement were to challenge the agreement, then the Commission would apply all applicable court precedent in interpreting and applying the provision.

We write separately to highlight several issues. First, it is important to state more directly than the majority does that section 12.2 of the Amended Piedmont Agreement is inconsistent with the D.C. Circuit's *Maine PUC* decision.

Second, we note that after acknowledging the *Maine PUC* decision, the majority makes the following statement in a footnote:

> The Commission further notes that, in light of the Maine PUC decision, to the extent contracting parties file new provisions that seek to impose a "public interest" standard of review on non-contracting third parties, the Commission would find acceptable a substitute provision that imposes on non-contracting third parties "the most stringent standard permissible under applicable law."[11]

This statement is striking when contrasted with the *Maine PUC* decision. The D.C. Circuit made clear that when a rate challenge is brought by a non-contracting third party, the "proper standard of review" is the "just and reasonable" standard. In addressing an issue that has been plagued by uncertainty and that has caused a great deal of time and expense to be incurred,[12] it is unfortunate that the majority now fails to follow the D.C. Circuit's holding and instead invites the submission of ambiguous contractual language.

Third, it is important to recognize that the D.C. Circuit's rationale in the *Maine PUC* decision applies with at least equal force to changes to an agreement sought by the Commission acting *sua sponte*. As the court explained, the *Mobile-Sierra* doctrine applies to preserve the terms of a bargain "as between the contracting parties."[13] The Commission is not a party to an agreement that it accepts under section 205 of the FPA.[14] Moreover, in section 206 of the FPA, Congress gave the Commission not only a statutory right, but also a responsibility,

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[11] *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201, at P 10 n.10 (2008).

[12] *See, e.g.*, Notice of Proposed Rulemaking on Standard of Review for Modifications to Jurisdictional Agreements, 113 FERC ¶ 61,317, at P 7 (2005).

[13] *Maine PUC*, 520 F.3d at 478.

[14] 16 U.S.C. § 824d (2000 & Supp. V 2005).

to take action as necessary "upon its own motion."[15] As the D.C. Circuit found with respect to challenges brought by non-parties that the statutory language of section 206 of the FPA "is quite clear,"[16] the proper standard of review is the "just and reasonable" standard when the Commission fulfills its responsibility by acting *sua sponte* pursuant to section 206 of the FPA.

Finally, we emphasize that use of the "just and reasonable" standard is fully consistent with promoting certainty and stability in energy markets. The Commission uses the "just and reasonable" standard judiciously in considering contract modification,[17] and we will continue to do so following the D.C. Circuit's *Maine PUC* decision. We believe that such action strikes an appropriate balance between recognizing parties' needs for certainty with respect to their agreements and protecting the interests of energy consumers.[18]

For these reasons, we respectfully dissent in part.

Jon Wellinghoff Commissioner	Suedeen G. Kelly Commissioner

[15] 16 U.S.C. § 824e (2000 & Supp. V 2005).

[16] *Maine PUC*, 520 F.3d at 478.

[17] In Order No. 888, for example, the Commission stated that it "does not take contract modification lightly" and indicated that an entity "has a heavy burden in demonstrating that the contract ought to be modified" even under the "just and reasonable" standard. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,664-65 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[18] There are many reasons why the Commission may decline to modify an agreement after applying the "just and reasonable" standard. For example, it may be relevant whether the original agreement has broad-based benefits, whether that agreement was negotiated through a stakeholder process that reflected a wide range of interests, and whether state commissions had meaningful opportunity to participate in such a stakeholder process.